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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1186

MORRIS S. BROMBERG,

Petitioner,

VS.

THE CHAIRMAN, MEMBERS AND EXECUTIVE DIRECTOR OF THE UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

PETITION FOR REHEARING

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Petitioner.

KEENAN PRINTING COMPANY

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On May 3, 1976, this Honorable Court denied Petitioner's Petition for Writ of Certiorari.

This Petition for Rehearing is presented pursuant to Supreme Court Rule 58 (b). The basis for the Petition is that there exists a substantial ground for granting certiorari which was not previously specifically presented to this Court.

In the previous petition for Writ, there were three Questions Presented, none of which directly presented the paramount constitutional question, herewith presented, namely:

"Where it is shown that the U.S. Civil Service Commission has created a *de facto* classification between federal and non-federal applicants for the position of Administrative Law Judge, which classification is neither authorized by Congress nor by its own Code of Regulations, and

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the classification is not shown to have a *compelling* governmental interest, does this not constitute invidious discrimination, which violates petitioner's Equal Protection rights under the Fifth Amendment?

The precedent for petitioner's instant petition for rehearing was established in *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 83 S. Ct. 1175 (1963), where, after denying Willner's first petition for certiorari, this Court, upon the presentation of a second petition based on constitutional grounds not previously presented, not only granted certiorari, but reversed and remanded.

In *Willner*, Mr. Justice Black, speaking for the Court concluded:

> "This case whatever it started out to be, has become one in which due process requires either *de novo* consideration of petitioner's application or an orderly sorting out of the issues and an *articulated* and *constitutionally grounded* decision on the merits of petitioner's claim to admission." (emphasis added)

Willner presented a factual situation which strikingly parallels the case presented here.

Willner had passed the bar but was denied admission to practice on grounds of character and fitness. Years later, in his second petition, Willner asserted that he was excluded from the practice of law in a manner and for reasons which contravened the Due Process or Equal Protection clause of the Fourteenth Amendment.

In the instant petition, petitioner emphasizes that he was found:

> ". . . to have met the basic eligibility requirements of the type, level and recency of experience required by the Commission [in its Announcement #318][1] for

1. In its Announcement #318 for Hearing Examiner (now Adm. Law Judge), the Commission on pgs. 5 to 12, specified in detail the requirements for the position. On p. 13 the Announcement stated:

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the position of Administrative Law Judge." (District Court Finding #3, Ap. B2 and Finding #4, Ap. B3).

In his Amended Complaint, filed below, petitioner asserted that he had been denied acceptance for the position of Administrative Law Judge in a manner and for reasons which contravened the Due Process clause of the Fifth Amendment as well as his Equal Protection rights.[2]

After proofs were closed in the trial below, by leave of Court, petitioner added an amendment asserting discrimination on Title VII grounds. (Title 42 U.S.C. par. 2000e-16, et seq.).

Neither the District Court nor the 7th Circuit Court of Appeals, made *any* determination as to whether petitioner's *consitutional* rights had been violated. The District Court did find however, that it was "error" for the Commission to discriminate against petitioner because he was an assistant State Attorney General and not a *Federal attorney applicant*. (Find. #6, Ap. B4)

The District Court also found that the Commission gave an initial preferential award (rating) to the 58 federal applicants (who were found qualified) 60 points ["A" rating], while *none* of the 95 non-federal applicants (who

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"In the case of an applicant who is found to have *clearly* met the requirements of this Announcement, confidential inquiries will be sent. . . ."

The inquiries were sent.

2. While Willner's petition (supra) claimed under the Fourteenth Amendment and petitioner under the Fifth Amendment in *Buckley* v. *Valeo*, —— U.S. ——, 96 S. Ct. 612 (1975), this Court ruled:

"Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth."

In *Weinberg* v. *Weisenfeld*, —— U.S. ——, 95 S. Ct. 1225, 1228 (1975), this Court said:

"This Court's approach to Fifth Amendment Equal Protection claims has always been precisely the same as equal protection claims under the Fourteenth Amendment."

In *Douglas* v. *Hampton*, 512 F. 2d 976, 981 (D.C. Cir. 1975), the Court ruled:

"No court has distinguished the standard mandated by the Fifth and Fourteenth Amendments from that specified by Title VII. . . . The *Griggs* standard is the measure and rights of the parties."

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were found qualified) received an initial rating of 60 points.[3]

The District Court, without passing on the constitutional question presented, simply ruled that Title VII did not apply to the "Type of discrimination" alleged.

It is to be observed that Respondent's Memorandum, filed in opposition to Petitioner's petition for Writ, echoed the Trial Court's decision that "Title VII . . . applies only to discrimination on account of 'race, color, religion, sex, or national origin." (Resp. Memo. p. 2).

In Respondent's Memorandum, it is asserted, without supporting judicial authority, that:

> "Discrimination [by the commission] against attorneys having no federal experience is not prohibited by Title VII." (Resp. Memo. p. 2).

This may prove to be true. The fact is however, that this Court has never prescribed the parameters of Title VII and to the best of our knowledge neither has any Federal Court.

While contending that the admitted discrimination against non-federal attorney applicants is not prohibited by Title VII, the Commission patently overlooks the fact there is nothing contained in its Announcement #318, limiting eligibility for the position to Federal attorney applicants. On the contrary, the Announcement, on p. 5, provides that qualifying experience for eligibility may also be obtained by a lawyer with trial experience in courts of original and unlimited jurisdiction.

By the above statement in the Memorandum, the Commission has once again conceded that it does discriminate against attorneys without federal experience.

It appears to be likewise established that the present discriminatory policy of the Commission is a perpetuation

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3. As shown on page 9, non-federal applicants are *"presumed* by the Commission to acquire" a "C" rating (55 points).

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of the effects of the discriminatory policy that prevailed prior to 1970. Prior to July 1970, applicant eligibility was limited to those with 2 years of Administrative law experience. This resulted in chilling and virtually eliminating hundreds, if not thousands, of prospective applicants, who did not possess administrative law experience. Since 1970:

> "Qualifying experience may be obtained . . . by preparing and trying (or hearing) cases in Courts of original and unlimited jurisdiction.
>
> "The latter standard was adopted by the Commission in July 1970, after considering a recommendation made by the Administrative Conference of the United States."[4]

Before we delve into the constitutional issues here involved, we beg the indulgence of this Court to briefly discuss an issue presented in the Respondent's Memorandum (at p. 4) that:

> "Petitioner *incorrectly* contends (pet. 7) that this case 'presents substantially the same questions of law' as *Washington* v. *Davis*. . . . *Davis* involves allegations of racial discrimination. No such allegations have been made here. See *Griggs*. . . ."

Griggs hardly provides judicial support for the Commission. While *Griggs* did involve racial discrimination, nevertheless the Court there ruled:

> "*Discriminatory preferences* for *any group* . . . is *precisely* and *only* what Congress has proscribed. What is required by Congress is the removal of artificial, *arbitrary* and unnecessary barriers to employment when the barriers operate invidiously, to discriminate

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4. Excerpted from an article by *Charles Dullea*, Director of the Office of Administrative Law Judges of the Commission, reported in *Administrative Law Review*, Vol. 25, p. 45 (Winter 1973 issue).
While not strictly relevant, petitioner, to indicate the capriciousness of the Commission in this case, observes that, as shown in his original application, he has handled well over 100 cases of Administrative Law Review as Assistant Attorney General in addition to a broad and successful trial and appellate experience, in the state *and* federal courts.

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> on the basis of racial or *other* impermissible *classification*. . . ." (Emphasis added.)

In the recent case of *Franks* v. *Bowman*, No. 74-728, 44 LW 4356, Mr. Justice Brennan for the majority cogently observed that the *underlying* legal *wrong* affecting the applicant, was not the alleged operation of racially discriminatory *seniority* system, but of a *discriminatory hiring system.*

Respondents mistake petitioner's reference to the similarity of issues in his case and in *Davis.* All that the petition contends is that both cases turn on whether proof of disproportionate pass-fail statistics *alone* establish a *prima facie* case of discrimination and shifts the burden to the prospective employer to justify the discrimination.

If this Court affirms *Davis* on this issue, then petitioner is entitled to the benefit of that ruling. The case at bar, however, goes far beyond the issue of pass-fail statistics which indicate only *prima facie* a *presumption* of discrimination. In the instant case, the discrimination is *established* by the Trial Court's Findings (Ap. B4 and B5) as well as by the Commission's *admissions.* The pass-fail statistical evidence is simply cumulative.

By the consistent rulings of this Court, beginning with *Griggs,* once the fact of discrimination is established, the burden shifts to the employer to show that the employment practice is job-related. More recently, this Court in *Albemarle* v. *Moody,* ——U.S.——, 95 S. Ct. 2362, reaffirmed *Griggs* thusly:

> "If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."

In the case at bar, it is not contended by the Commission that it made any attempt to show the job-relatedness to its admitted employment practice of discriminating against non-federal applicants.

While the law may be unsettled as it relates to the parameters of Title VII proscribed employment practices, the law *is* well settled as to the constitutional prohibitions against practices which violate Equal Protection rights. This Court has repeatedly ruled that invidious discrimination is violative of the Constitution. A few examples will serve to illustrate that point.

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373, 374 (1886), this Court ruled that a purposeful and intentional discrimination between persons or classes violated the Equal Protection of the Law.

In *Royster Guano* v. *Virginia*, 252 U.S. 412 (1920), which involved an issue of Equal Protection of the Laws, this Court laid down the basic rules applicable to *classification*: . .

> ". . . the classification must be reasonable, not arbitrary and must rely upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. . . ."

In the recent case of *Shapiro* v. *Thompson*, 394 U.S. 618, 69 S. Ct. 1322, a statute prohibited welfare benefits to residents of less than one year in the State. This Court affirmed the three-judge District Court, which ruled the statute invalid as denying the equal protection secured by the Fifth Amendment, because it *created* an invidious and irrational *classification*. This Court noted that the Appellees met the test for residence as well as all other eligibility[5] requirements except for the lack of one year's residence.

The Court ruled that the interests sought to be promoted by the attempted classification "either may not constitutionally be promoted or are not *compelling* governmental interests."

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5. It has been previously noted (p. 2) in this petition that petitioner met the "eligibility requirements" of the Commission.

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In *Levy* v. *Louisiana*, 391 U.S. 68, 88 S. Ct. 1509 (1968), an action was brought on behalf of illegitimate children for the wrongful death of their mother. This Court reversed the ruling of the Court below, which held that a "child" under the statute meant a "legitimate child", holding that while a State has broad discretion to make classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. ". . . the end result is whether the line drawn is a *rational* one."

In *Butts* v. *Nichols*, 381 F. Supp. 573 (U.S. D.C. S.D. Iowa 1974), a three-judge court ruled that a state statute prohibiting employment of convicted felons in civil service positions, violates the Equal Protection clause of the Fourteenth Amendment. The Court ruled that "The State must *also* show a *compelling* State reason [a rational basis] which could avoid the adverse effect of the statutes. . . ."

In *Turner* v. *Department of Employment*, ——U.S.——, 96 S. Ct. 249 (1975), this Court, in consonance with its previous decisions, ruled unconstitutional a challenged provision which sought to establish a blanket disqualification during an 18 week period immediately preceding and following childbirth, which rested on a "conclusive presumption" that women are unable to work during that period.

The Commission recognized the validity of the "rational basis theory" in its Code of Federal Regulation (5 C.F.R. par. 300.103(b), Ap. E2):

> "There shall be a *rational* relationship between performance in the position to be filled . . . and the employment practice used. The demonstration of *rational relationship* shall include a showing that the employment practice was professionally developed."

This then is the Code. What of the practice? In a pleading filed by the Commission below this was the "rational relationship" shown:

> "Although page 4 of the Commission's Rating Schedule does indicate a Federal agency attorney (G. S 15 status) *will* be assigned an "A" rating (60 points) . . . and indicates a State agency attorney is *presumed* to acquire a "C" rating (55 points) . . . that differentiation has a rationale [sic] basis: the position being applied for is a Hearing Examiner (Adm. Law Judge) for federal administrative work." (Emphasis added.)

Assuredly, it requires no citation of authority that the "conclusive presumption" made by the Commission offends the equal protection rights of non-federal applicants of which class petitioner is a member, absent empirical test evidence.

In our initial petition we presented the question as to whether the Commission is bound by law to follow its own regulations. Stated otherwise, "no man is above the law." Not even the President of the United States. *United States* v. *Nixon,* 418 U.S. 683, 94 S. Ct. 3090 (1974). Can it be seriously urged that the Commission, which is the chosen guardian of Civil Service, is above the law and is not obliged to follow the rules which *it* has laid down for *all* federal agencies?

The House Report, accompanying P.L. 92-261, the Equal Employment Opportunity Act of 1972, stated the position of petitioner succinctly:

> "The Federal service is an area where equal employment opportunity is of paramount significance. Americans rely upon the maxim 'government of the people' and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental process. It is therefore imperative that equal opportunity be the touchstone of the Federal system." (1972 Vol. U.S. Cong. and Adm. News, page 2137).

The Commission which demands from private employers an adherence to Equal Opportunity in employment, the Commission which proudly describes itself as an "Equal Opportunity Employer" must not only follow its own regulations, it must show the way by its own example.

CERTIFICATE OF COUNSEL

MORRIS S. BROMBERG, attorney pro-se for Petitioner in the above Petition for Rehearing, hereby certifies that he is an attorney at law, duly admitted to practice before the United States Supreme Court. He further certifies that the Petition, in his opinion, presents a meritorious basis for Rehearing; that it is filed in good faith and is not for the purpose of delay.

Respectfully submitted,

/s/ _____

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